No. 15,921

In the
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

IN THE MATTER OF
HYACINTH M. FLICKINGER, Bankrupt,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLANT

O. O. McLANE,
J. PETER P. HEALY,
Attorneys for Appellant

918 Puget Sound Bank Bldg.
Tacoma, Washington

SUBJECT INDEX OF BRIEF

TABLE OF CASES AND CITATIONS

In the
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

IN THE MATTER OF
HYACINTH M. FLICKINGER, Bankrupt,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLANT

Pursuant to the rules of the Court of Appeals Ninth Circuit, Appellant submits this her brief on appeal:

1. *POLICY OF THE LAW*: It is the policy of the law generally to favor and prefer homesteads for the protection of the family, the bulwark of American life, and provisions for homestead exemptions are entitled to liberal construction. *Van Slyke v. Bumgarner*, 177 W.326, 31 P.2d. 1014; in Re: *Dudley*, 72 F.S. 943 (Cal. 1947; Yankwich, J.), 120 F.S. 317; *First National Bank etc., v. Tiffany*, 40 W.2d. 193, 242 P.2d. 169.

2. *NO FEDERAL HOMESTEAD LAW*: There is no provision made by the Federal Statutes for homestead claims, so far as the subject of bankruptcy is concerned, but it is the custom, policy and practice, in bankruptcy proceedings, to concede, allow and order exemptions of homesteads properly claimed, in accordance with the State Statutes of the State wherein the bankrupt is domiciled; and to follow the provisions of the State Statutes and the interpretations of such Statutes as interpreted by the highest Courts of the States with relation to homestead exemptions. *Burns v. Kinzer*, 161 F.2d. 806 n. (Tenn. 1947); *Allen v. Tate*, 6 F.2d. 139 (Miss. 1925). 3 REM. on Bankruptcy, Sec. 1294.

3. *WASHINGTON HOMESTEAD STATUTES*: The State of Washington homestead exemption laws are comprised in RCW 6.12, from which, the following quotation is taken:

> "Every homestead claimed in the manner provided by law, shall be presumed to be valid to the extent of all the lands claimed, until the validity thereof is contested in a Court of general jurisdiction, in the County or District in which the homestead is located."
>
> (RCW 6.12.090.)

In this case, throughout its whole history, the lands have been doubly claimed by the bankrupt, since prior to the institution of bankruptcy proceedings, by her application for an award in probate in lieu of homestead provisions of the law; and again by a formal declaration of homestead, pursuant to the Statute,

executed, acknowledged and filed of record before the institution of bankruptcy proceedings; and there has never been any contest of the validity of said homestead so claimed by the bankrupt in any Court of general jurisdiction.

4. *COURTS*: Federal Courts, including Bankruptcy Courts, are all Courts of special and limited jurisdiction and are not Courts of general jurisdiction.

> "The Federal Courts are all Courts of special and limited jurisdiction * * *" 54 Am. Jur. 671, Sec. 10, and cases there cited, including *Chicot, etc., v. Baxter State Bank*, 308 U.S. 371, 60 S. Ct., 317, 84 L. Ed. 329. See also *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 61 S. Ct. 179.

It needs no citation of authorities that the Superior Court of the State of Washington is a Court of general jurisdiction, without limitation. Therefore, any contest of the validity of this bankrupt's doubly claimed homestead could be properly determined only in the Superior Court of the State of Washington for Pierce County, a Court of general jurisdiction; and not in any Federal Court whatever.

Moreover, since the trustee, in this instant case, set apart, as exempt, the homestead claimed by the bankrupt herein, and that order of the trustee filed in the bankruptcy proceedings has never been set aside nor modified, nor reversed in any way or manner, it would appear that the bankruptcy Court has no jurisdiction to entertain a contest on the validity of that homestead.

> "A Court of bankruptcy is without jurisdiction to order the sale, for any purpose, of property which it has set apart to a bankrupt as his homestead exemption." In Re: *Yungbluth*, 220 F. 110. See also *In Re*: *Von Hee*, 238 F. 422 and *Van Slyke v. Bumgarner*, *supra.*

5. *CLAIMS — LIEN AND NON-LIEN*: In this instant case there are no lien claims shown, therefore, it would appear obvious that there could be no conflict between a lien claim and a non-lien claim. In such an event it does not appear that the principal basis of the trial judge's original decision so far as Sec. 70(c) (11 USCA 110(c)) is either necessary or applicable. Referring to the language of the trial judge's decision, dated February 13, 1957, but corrected to read December 13, 1957, he says:

> "From the foregoing it is clear that under Washington law a creditor of the bankrupt could have obtained a lien on the subject property by legal or equitable proceedings at the time of adjudication of bankruptcy. Under the rule recently laid down in this circuit, in *England v. Sanderson*, 236 F.2d. 641 (9th Cir. 1956) * * *."

We submit that it is not "clear" that a creditor of the bankrupt *could* have obtained a lien against this property as of such date or any other dates subsequent to March 26, 1957, when the probate homestead was set aside to her, or not subsequent to the date when she filed her declaration of homestead prior to filing her petition in bankruptcy, WITHOUT first having contested the homestead declaration under the provisions of RCW 6.12. This homestead law, as we view

it and as it appears to be sustained by the decisions under it, absolutely precludes a creditor obtaining a lien upon the exempt property without first contesting the exemption *successfully*.

6. *BANKRUPTCY PROCEDURE*: Although it must be obvious that the affirmative provisions of the language of the Bankruptcy Act must control, it is the general rule that equitable principles prevail in bankruptcy where they are not in conflict with the provisions of the Bankruptcy Act, to the end that justice shall be done consistent with the Bankruptcy Law, rather than that strict and rigid rules of the law Court, distinguished from Courts of equity, shall prevail. *6 Am. Jur.* 573-575, Sec. 35.

7. *RES JUDICATA*: While on the subject of this decision of the trial Court, he says in the next to last paragraph thereof:

> "The contention raised by Counsel for the bankrupt that the order of the Superior Court for the State of Washington for Pierce County, in Probate Cause No. 62579, fixing the value of the property herein in question as of March 26, 1957, at $5,807.42 is *res judicata* as to the value of such property at the later date of bankruptcy adjudication, obviously is without merit."

We are obliged to disagree with this statement for reasons of both fact and law. The trial Court's quoted statement shows the date of Probate set aside March 26, 1957, this record shows the bankruptcy was filed May 14, 1957, one month and eighteen days after

the set aside. Manifestly there could not have been any material change in the value in that short period of time. As a matter of law, neither the trial Court nor any other Court should be permitted to brush off the decision of Judge Neterer in *Naslund* 6F. Supp. 109, which is consistent with the holdings in re: *Rhodes*, 109 F.117; *In Re*: *Eash*, 157 F. 996; *Martin v. Oliver*, 260 F. 89. The facts in the Oliver case are almost identical with the facts in the instant case. See also *3 REM. Bankruptcy*, Page 179, Sec. 1286; 2 F.2d. 164 aff'd in 4 F.2d. 285. We feel that this Naslund case is determinative of the instant case.

In the trial judge's decision of January 2, 1958, he places some reliance upon the case of *Mulane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, with respect to notice of judicial proceedings, but the creditor's claim, which gives rise to the issues in this case, was filed in Probate and again in bankruptcy; the filing in bankruptcy was pursuant to a notice to creditors duly given and done in the probate case. In as much as the Mulane case has to do with the sufficiency of legal notice in judicial proceedings, it must be manifest that the Mulane case has no bearing at all upon the facts of this case.

SUMMATION: In view of the above citations and their application to the different principles of law and the law of the Statutes cited, the effect of the trial Court's decision is to destroy the liberal construction, do away with the equitable nature, make the homestead claim disfavored in law, ignore the

exclusive jurisdiction of the Superior Court in its general jurisdiction to entertain a contest of homestead claim, and absolutely upset the *res judicata* decree of the Probate Court, and wipe out the legal effect of the bankrupt's homestead declaration before bankruptcy, without contest, and to completely reverse the action of the trustee in allowing and setting aside the homestead to the bankrupt.

It must be admitted that Sec. 70(c) of the Bankruptcy Act, which has been on the books for many years, even though amended in 1950 and 1952, must have a terribly devastating effect to wreak so much havoc with the foregoing principles of law and the Statutes and Orders, and make the result so completely unimaginable, unconscionable and unprecedented; we cannot believe that it was ever intended by Congress that said Sec. 70(c) could be so used as to result in these effects.

Respectfully submitted,

O. O. McLane

J. Peter P. Healy

Attorneys for Appellant.